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IN THE

SUPREME COURT OF THE UNITED STATES

MATHIAS, RICHARD L., ET AL.
PETITIONERS,

V.

WORLDCOM TECH., INC., ET AL.
RESPONDENTS

Writ of Certiorari to the Seventh
Circuit Court of Appeals

BRIEF FOR COALITION FOR LOCAL SOVEREIGNTY SUPPORTING THE PETITIONER

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24 pp

Questions Presented

Can Congress require States to enforce the 1996 Telecommunications Act, or restrict the jurisdiction of State courts over State agencies?

Does a State's decision to voluntarily cooperate with provisions of the 1996 Telecommunications Act constitute a voluntary waiver of its immunity from suit in federal court?

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INTEREST OF AMICUS CURIAE[1]

Coalition for Local Sovereignty is made up of state and local officials, as well as concerned citizens, working to uphold the principle of local self-government and community based decision making. As the only national organization dedicated exclusively to the restoration of local self-government, we possess a unique perspective on such cases.

Counsel to the petitioner, and counsel to the respondent, have consented to the filing of this *amicus* brief. Consent letters are on file with the Clerk of the Court.

SUMMARY

When Congress passed the Telecommunications Act of 1996, it choose to rely upon "the vast resources and expertise of State public service commissions"(*Bell Atlantic v. MCI*) for resolving disputes which might arise regarding intra-state phone service, rather than attempting to provide a separate federal forum to resolve various issues. Congress, however, did provide that if a State refused or neglected to perform various functions foreseen by the Act that the FCC would set up its own system instead.

This system by which Congress and the FCC makes use of existing state structures has been termed "participation" of state agencies in a federal regulatory program – although we believe it would be more accurate to describe the States' activity as "cooperation with" the federal government, rather than "participation in" it.

This cooperation with the federal government is

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[1] This brief was authored by counsel for Coalition for Local Sovereignty, no other person has made any monetary contribution for its preparation or submission.

completely voluntary on the part of the State, and, in effect, is doing the federal government a favor by saving the federal government the expense of having to perform various types of actions, such as mediating disputes and applying State contract law.

In passing the Telecommunications Act of 1996, Congress could not have overridden a State's Elventh Amendment Immunity to private suit in federal court (*Seminole Tribe*, 517 US 44 (1996)), nor does a State's voluntary cooperation with a federal program even remotely constitute a waiver of that immunity, since this Court has ruled that a State's consent to suit must be "unequivocally expressed" (*Pennhurst*, 465 US 89, 99)) and "altogether voluntary" (*Beers v. Arkansas*, 20 How., at 529).

Portions of the Telecom Act of 1996 which attempt to strip State courts of jurisdiction over actions of State agencies, and which suggest that Congress tried to "commandeer" State agencies, are clearly unconstitutional as they run afoul of this Court's recent Tenth Amendment (*New York v. US* (505 US 144 (1992)), *Printz v. US* (no 95-1478 (1997))), and Elventh Amendment cases.

ARGUMENT

I. Congress may neither commandeer State agencies nor strip State courts of jurisdiction over State agencies.

It is clear that neither Congress nor the FCC can require any State agency to enforce any section of the Telecommunications Act. This Court made that clear in *New York* v. *US* (505 US 144 (1992)) and *Printz v. US* (no 95-1478 (1997)): "The federal government may neither issue directives requiring the States to address particular problems,

nor command the States' officers, or those of their political subdivisions to enforce a federal regulatory program." Title 47 sections 251 & 252 clearly fall within the *Printz* doctrine. Congress has no authority to require States to participate; if they choose to do so, it is purely voluntary.

The 1996 Telecommunications Act passed a year before this Court's most explicit statement in *Printz v. US*, seems to assume that Congress could require State utility commissions to enforce parts of the act, just as an earlier Congress required sheriffs to enforce parts of the Brady Bill.

In numerous places the Act uses the language that, "The State commission shall" (as for example in 252 (b)(4)(c) "The State commission shall resolve each issue set forth in the petition and the response." In addition "the Act actually conscripts State governmental agencies for federal purposes. See, e.g., 47 U.S.C. §§ 251(f) (mandating that State commissions conduct inquiries for the purpose of terminating rural telephone company exemptions); 47 U.S.C. §§ 332(c)(7) (requiring local zoning boards to apply federal procedural standards in approving the siting of telecommunications towers and facilities)" (Bell Atlantic v. MCI, Fourth Circuit).

These statements are mitigated somewhat by Congress's failure to impose any penalty on State commissions which refuse to participate. Section 252(b)(5) simply provides that "If a State commission fails to act to carry out its *responsibility* under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction" [emphasis added].

While one could argue that Congress acknowledged the voluntary nature of state participation by placing no penalties on the state other than that the FCC will do the job

instead, the fact that Congress claims that States have a "responsibility under this section" to carry out the provisions of the act, indicates quite strongly that Congress incorrectly *assumed* that it could legally command state agencies to carry out provisions of the act.

The fact that Congress could not require States to cooperate is acknowledged by the United States. As the Fourth Circuit noted in *Bell Atlantic* "the United States, as an intervenor . . . note[s] that the State had a clear choice -- given in 47 U.S.C. §§ 252(e)(5) -- either to participate in the regulation of interconnection agreements or to forego such a role and allow the FCC to act in its stead" (992459P (2001)).

The incorrect assumption by Congress that it could commandeer State agencies, is all the more clear and reaches its most destructive element in 252(e)(6) in which Congress declared that **"no State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section."**

This provision begins to bear very directly on the issues in the present case, and seems to be matter of disagreement between the Fourth and Seventh Circuits. The Fourth Circuit in *Bell Atlantic* notes that according to Maryland law "Any 'party or person' who is 'dissatisfied' with any final decision or order of the Public Service Commission may seek judicial review in the State circuit court" because "the Maryland Public Service Commission's determination in this case was not a §§ 252 determination." The Seventh Circuit believes that such suits are preempted by the Act. Neither Court, however, seems to have asked whether Congress had constitutional power to 'preempt' State court jurisdiction over State agencies.

Fortunately, the issue here is quite clear -- given this Court's pronouncements in *New York*, and *Printz* -- that Congress may not deprive a State court of jurisdiction over State agencies. It also runs afoul of the principle – recently reaffirmed by this Court in *Bush v. Palm Beach County* (00-

836) that "It is fundamental that state courts be left free and unfettered by us in their interpretation of state constitutions" (quoting *Minnesota v. National Tea Co.*, 309 US 557 (1940). The Telecom Act tried to forbid state courts from addressing issues of State law which will surely arise from time to time by the actions of State agencies.

Congress's attempt to limit the jurisdiction of State courts over State agencies is also contrary to this Court's recent ruling in *Alden v. Maine* which declared: "A State is entitled to order the processes of its own governance . . . . If Congress could displace a State's allocation of governmental power and responsibility, the judicial branch of the State, whose legitimacy derives from fidelity to the law, would be compelled to assume a role not only foreign to its experience but beyond its competence as defined by the very constitution from which its existence derives."

In addition to being contrary to the fundamental principle that State courts must be left free to interpret State law, Congress's requirement that State courts could not review actions by State commissions, is clearly predicated upon the false assumption that Congress could validly commandeer State agencies. Congress must have assumed that once a State agency is commandeered by the federal government that the agency is no longer acting as an agent of the State but only as an agent of the federal government. Presumably under such circumstances, State courts would have no more jurisdiction over the actions of a deputized State agency than it would over any other federal agency.[2]

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[2] We believe Congress could not totally immunize even federal officials from all suit in state court (much less State officials). This is question which may soon need to be addressed by this Court, if it decides to review STATE OF IDAHO v HORIUCHI (Ninth Circuit, No. 9830149). Congress could restrict federal court jurisdiction over officials (such jurisdiction

For this theory to be true it relies on the assumption that Congress may forcibly deputize or commandeer state agents or agencies such that they are, in effect, no longer state agencies, at least insofar as they enforce federal regulations. In other words, Congress must have reasoned that when a State commission acts under authority of federal statutes, rather than under State law, that no matters of State law apply. This Court has made clear, however, that Congress may not commandeer State agencies or officials, and their participation in helping enforce federal regulations is purely voluntary.

Since participation by state agencies is voluntary, mandatory State laws governing the actions of state commissions must take precedence over any voluntary action a state agency might decide to take on behalf of the federal government.

We belief this principle is beyond dispute; but to illustrate, let us take an example from the *Printz* case. The Brady Bill told the chief law enforcement officer (CLEO) of each county or city to provide background checks, but these actions, as this Court has declared, were purely voluntary. What if a state passed a law setting up a central state agency to perform background checks for gun purchases and forbad sheriffs from performing this function?

We believe it is obvious that CLEOs would be

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does not come under this Court's original jurisdiction, and therefore is subject to restriction by Congress). If Congress could also prohibit state courts from hearing suits against government officials, that would allow the disturbing prospect that government officials could be exempt from prosecution in any court; a situation which this Court has said would be "a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights" (*Lee v. US*, 106 US 196).

required to follow the state law, which they are sworn to uphold, and could not violate that law simply because the federal government had invited them voluntarily to do so. The CLEO could not ignore his responsibility under State law by claiming to act only under authority of a federal statute.

It follows from these considerations that State officials and State agencies remain subject to State law before, during and after any voluntary enforcement of federal laws.

If State agencies remain subject to State law even while voluntarily performing functions on behalf of the federal government, then it must be the case that State courts also retain jurisdiction over enforcement of such laws.

We believe, therefore, that Congress clearly acted unconstitutionally in attempting to strip State courts of jurisdiction over State agencies which act in cooperation with provisions of the Telecommunications Act.

The seventh circuit decision relied heavily on the Congressional exclusion of State courts for its decision. It reasoned – plausibly enough – that if Congress had denied jurisdiction to State courts that it must have assumed that federal courts would exercise jurisdiction. ("Subsection 252(e)(4), [denying jurisdiction to state courts] when read in conjunction with subsection 252(e)(6), shows that Congress contemplated suits against state defendants in federal court.") While this is a plausible inference, the fact that Congress clearly exceeded its authority in trying to strip State courts of jurisdiction, invalidates the Seventh Circuit argument which rested on the assumption of constitutionality for denying State jurisdiction. Indeed, the Seventh Circuit's clear misunderstanding of the principle laid down in Printz, must call into question its entire opinion.

Moreover, even the Seventh Circuit itself, noted that such a conclusion resulted in practical difficulties which "may not have much to recommend it." The Seventh Circuit

concluded its opinion by declaring.

> Federal jurisdiction under 252(e)(6) is exclusive when it exists. Thus every time a carrier complains about a state agency's action concerning an agreement, it must start in federal court (to find out whether there has been a violation of federal law) and then may move to state court if the first suit yields the answer "no." This system may not have much to recommend it, but, as the Supreme Court observed in Iowa Utilities Board, the 1996 Act has its share of glitches, and if this is another, then the legislature can provide a repair.

Thus we believe that the idea that federal jurisdiction is exclusive is not only unconstitutional, but (in the admission of the lower court) largely unworkable.

It might indeed raise a problem if State utility commissions in cooperating with the Telcom Act were unable to be reviewed in federal court due to the Eleventh Amendment and were also unable to be reviewed in State court due to 252(e)(6). However, this difficulty is easily overcome by the recognition that 252(e)(6) is unconstitutional, and State utility commissions, like other State agencies, remain subject to whatever State court review the State legislature has provided. The disagreement between the conflict circuit courts is easily resolved by this recognition that Congress exceeded its authority under 252.

II. Voluntary State cooperation with a Congressionally enacted scheme is not consent to be sued

The United States and the Seventh Circuit maintain that States have "implicitly" waived their Eleventh

Amendment immunity "by perticipating in the regulatory scheme established by the 1996 Act." We believe this doctrine of "implicit consent" so recently rejected by this Court, ought not be invoked again.

The Seventh Circuit relies in the present case on its decision in *MCI et al v. Illinois Commerce Commission* (168 F.3d 315 (7th Circuit 1999)), in which the Seventh Circuit declared: "For reasons that follow, we hold that the Eleventh Amendment does not bar such suits against the state commissions and their commissioners because, in the particular circumstances in these cases, the states have waived their Eleventh Amendment immunity by participating in the regulatory scheme created by the Act."

The Seventh Circuit incorrectly assumes that when a State commission acts in conformity with provisions of the Telecommunications Act, that the Commission is acting solely under authority of that Act. That presumption need not be true, and, in fact, is probably never true. As the Fourth Circuit has noted "State commissions have authority to interpret and enforce interconnection agreements" under State law (Md. Code Ann., Pub. Util. Cos. 2-113).

Even when State commissions act in accordance with the federal Telecom Act, the commissions are not acting "under the authority" of the federal act (at least, not exclusively), but are acting "under the authority of State law. Even if the Telecome Act of 1996 did not exist, the type of action of State commission at issue in the current case could still have proceeded under State law. State commissions would not exist at all, to help enforce the Telecom Act, if not for existing State law which constitutes the commission to begin with, and which invests them with authority under State law.

For example, the Telecom Act provided that a State may mediate disputes: "Any party negotiating an agreement

under this section *may*, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation." Mediating disputes between local companies is most likely a function that some state agency performed long before the 1996 Act, and continues to perform. In fact, mediating disputes between state citizens and companies is not limited to telecom companies but is a service provided by the state for anyone who cares to make use of it.

Congress simply took advantage of a pre-existing State function to streamline the federal process: "Congress appropriately recognized the benefit of employing the vast resources and expertise of State public service commissions" (*Bell Atlantic*). It is Congress that has elected to "participate in" State the services provided by State commissions, and not the other way around.

State commissions are only continuing to carry out provisions of State law which remain in effect, and which were enacted prior to the Telecom Act of 1996. The Seventh Circuit interprets a State's failure to repeal an existing State law, or change an existing State policy, as "consent" to be sued. Such a theory is all the more preposterous given that no State legislature could have possibly known – short of a determination by this Court – that repeal of existing State laws would be necessary in order for a State to protect its immunity.

A. Consent must be explicit and voluntary.

The theory of implicit consent is clearly contrary to this Court's recent pronouncement in *Florida Prepaid v. College Savings Bank* (98-531, (1999) that

> there is little reason to assume actual consent based upon the State's mere presence in a field subject to congressional regulation. There is a fundamental difference between a State's expressing unequivocally that it waives its immunity, and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity.

The theory in the present case goes so far as to suggest that if a State *fails* to take certain action it will be deemed to have waived immunity.

When two telecom companies make use of the State mediation process, it is far from the case that the State commission is "acting under the authority" of the federal telecom act; rather, it is simply doing what it has always done, with or without the federal statute. If this is the case, then the State commission is not acting under authority of any federal statute, nor can the State be said to have voluntarily consented to participate in enforcing a federal scheme. On the contrary, it is Congress which has chosen to voluntarily make use of a pre-existing State set-up.

Far from Congress giving the States a "gift," or doing them a favor, by allowing them to cooperate with the FCC, rather it is the States who are doing a huge favor for the FCC by "employing their vast resources and expertise" which enormously benefits the federal government.

If the federal government does not like the way a State handles such cases then it is free to set up its own independent process in the FCC, but it cannot command a State to perform differently when the State's assistance is purely voluntary. We believe it would be a novel and dangerous doctrine to imagine that Congress could extend the jurisdiction of the federal courts to matters previously reserved to the States, simply by making use of already existing State structures.

For example, Congress might pass a law requiring that for child custody disputes arising on military bases that the servicemen will need to use the already existing family courts

of the State in which the base is located. It would not be accurate to describe such a situation as one in which the State has agreed to participate in a federal law, but rather that the federal government has decided to make use of a State agency rather than set-up a family law section for military courts. It would certainly not be true that State family courts would suddenly become instruments of the federal government simply by virtue of doing what they always do, or that this would constitute some sort of consent waiving State immunity.

The situation with respect to the Telecommunications Act is quite similar. State agencies are enforcing State contract law, with respect to disputes between companies. This is a State function which States have always done. Simply continuing to do what they have always done, and are required to do under State law, hardly constitutes a voluntary waiver of immunity by "participating" in a federal scheme.

Moreover, when State commissions engage in resolutions of issue involving State contract law, they are not acting under authority of the federal government, but under authority of the state government.

The doctrine of voluntary, implicit consent argued for by the Seventh Circuit, is thus remarkably similar to the *Parden* doctrine which this Court has recently repudiated. *Parden*, of course, alleged that by simply engaging in a commercial activity which would – if carried on by a private entity, be subject to suit in federal court – that a State had implicitly waived its immunity. The Seventh Circuit in the current case makes the exact same argument: that by simply carrying on a certain type of activity, such action constitutes an implicit, voluntary consent to waive immunity.

This Court has used numerous formulations to describe the "stringent" test for determining "whether a State has waived its immunity from *federal-court" Atascadero State Hospital v. Scanlon*, 473 U. S. 234, 241 (1985). In

Great Northen Life v. Read (322 U. S. 47 (1944)) this Court said that there must be"a clear declaration of the state's intention to submit" to suit. In *Pennhurst State School and Hospital* v. *Halderman* , 465 U. S. 89, 99 (1984) (State's consent to suit must be "unequivocally expressed"). In *Beers* this court also declared that any decision be "altogether voluntary" *Beers v. Arkansas*, 20 How. 527 (1858)).

The present case clearly meets none of these requirements.

The Seventh Circuit's ruling in the present case, is so remarkably similar to *Parden* and so obviously contrary to this Court's recent ruling in *College Savings Bank*, that we see little reason to belabor the obvious here. We agree wholeheartedly with the observation of the Fourth Circuit in *Bell Atlantic* that "This argument is strikingly reminiscent of, and arguably weaker than, the argument made by the injured employee in *Parden*, 377 U.S. 184 (1964), overruled by *College Savings Bank*."

In our brief for College Savings Bank, Coalition for Local Sovereignty had advocated an explicit repudiation of *Parden*, and so it seems to us we have a special interest in seeing that it is never revived.

The Seventh Circuit, not only seeks to reinstate *Parden* – so recently overturned by this Court – but even to extend it. *Parden* relied upon a distinction between core functions of a State government, such as running police or courts, and non-core functions such as operating a commercial enterprise such as a railroad. The Seventh Circuit, however, seeks to expand the *Parden* exception even to core sovereign functions, as the operation of a public utilities commission clearly is. Upholding such a doctrine would be a complete reversal and repudiation of this Court's recent jurisprudence.

The Doctrine of "implicit consent" or "constructive consent" are constitutional solecisms. Despite the fact that

this Court overturned *Parden* and rejected the idea it has nevertheless bared its head again. We respectfully suggest that this Court should perhaps drive a stake through the heart of the doctrine once and for all by invoking the strongest possible language against it.

III. Even the doctrine of explicit consent is constitutionally suspect.

Indeed, we believe that the Eleventh Amendment means what it says, and that State governments may not waive immunity. The Eleventh Amendment is not phrased as a right or prerogative of States, but a restriction on the federal courts. The wording is clear: "The judicial power of the United States shall not be construed to extend to any suit . . ." It does not add "unless a state consents to it."

It is no more plausible to suggest that States may allow the federal government to violate the Eleventh Amendment than that states could allow the federal government to violate the First Amendment. After all, the language in the first and the Eleventh Amendments are similar: "Congress shall make no law" and "The judicial power .. shall not ... extend." As this court has repeatedly noted, the purpose of federalism and division of powers is not to protect states, but to protect the liberty of the people. As this Court noted most forcefully in New York:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of

> sovereign power." . . . Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the "consent" of state officials. ... State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution. *New York v. US*, 505 U.S. 144 (1992).

It is equally true that state officials cannot consent to the enlargement of the powers of the judiciary beyond those restrictions specifically placed on it by the Constitution. We believe that this Court's statement in New York is absolutely right, and that the Court's decision in *Clark v. Barnard* (108 U. S., at 447) that a State's sovereignty is "a personal privilege which it may waive at pleasure" is wrong, and clearly opposed to the principles espoused in *New York*.

While we do not expect this Court in the present case to repudiate the doctrine of *Clark* (as a faithful reading of the Eleventh Amendment would require) we do point out these consideration to show just how far from the requirements of the Eleventh Amendment the doctrine of implicit consent really is.

Moreover, we would suggest that this Court move towards a more limited and enforcable doctrine of "consent." For example, this Court could declare that a state shall never be deemed to have consented to suit in federal court unless the legislature has specifically passed a law specifically consenting to that type of suit. This would be in correspondence with this Court's observation in *Alden* that "Many States, on their own initiative, have enacted statutes consenting to a wide variety of suits." A judgement by this Court that such statutes are required before a federal court may claim consent would go a long way towards eliminating claims of consent based on the type of ephemeral claims we have witnessed over the years.

Given the seriousness of suits against states to a

State's independence, we view consent of a State's governor or attorney general as clearly inadequate, and contrary prior formulations of this Court. That a governor, or any other State official on his own could (without the approval of the State legislature) consent to a suit and subject a State to costly suit in federal court, for instance, would constitute an end run around the principle of legislative control and popular sovereignty.

In *New York v. US*, some had argued that support of the State's former governor for the law at issue was sufficient constitute consent of the State to the law at issue. While this Court clearly rejected that far-fetched claim, earlier statements such as found in *New York v. US*, *College Savings Bank*, and *Alden* have not deterred lower federal courts from continuing to find some ephemeral basis for suggesting consent by non-consenting states. Since this Court cannot possibly review each claim of consent on a case by case basis, it seems proper to set down clear limits for lower court about when consent has occurred. Moreover, the bar should be set quite high.

IV. Invoking the Ex parte Young exception runs afoul of recent statements of this Court

Invocation of the *Ex Parte Young* fiction (that a State really is not a party to the suit despite all appearances to the contrary), is clearly misplaced in the present case. Even if one accepts the basic premise of *Young* may be invoked to halt ongoing violations of federal edicts by State officials, no violation of federal statutes has occurred here.

States may either regulate in accordance with the guidelines set forth by Congress or they may choose not to. We emphasize these are merely "guidelines" since States cannot be required to enforce them. If States choose not to regulate in accordance with the guidelines laid out by

Congress (or the FCC) then the FCC may act in place of the State.

The United States seems to argue that while "participation" is voluntary, if the State chooses to participate that it must follow the prescriptions of Congress or be in violation of federal law. This is impossible, however.

To use *Printz* as an example, the Brady Bill attempted to require sheriffs to "make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever state or local record systems are available and in a national system designated by the Attorney General" (922(s)). Let us suppose that a sheriff elects to voluntarily "participate" in the background check requirement, however, he decides to use his own entirely different method to do those checks – for example, refusing to make use of the national system. It could not be true that such a sheriff was in violation of federal law, because he refused to follow the guidelines set by Congress. If the action is voluntary to start with, then the means whereby that action is carried out must also be voluntary.

Just so, the failure of a State to implement FCC determinations can hardly be said to be a violation of federal requirement, when the State has no legal obligation to act at all. If the FCC does not like the way a State commission is doing business, it is free to do the job itself

In previous briefs Coalition for Local Sovereignty has argued that *Ex parte Young*, was wrongly decided, is internally contradictory (what this Court has termed "a fiction"), and should be overturned – or at very least more specific guidelines given so that lower courts may not invoke Young at the drop of a hat. Like the "consent" doctrine, some lower courts – including the Seventh Circuit in the current case – are all to ready to invoke the Young fiction on the flimsiest of pretexts.

The Seventh Circuit's attempt to invoke *Young* clearly

runs afoul of this Court's recent pattern of steering clear of *Young*, best expressed in *Idaho v Ceour d'Alene Tribe* which declared:

> To interpret Young to permit a federal court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle, reaffirmed just last Term in Seminole Tribe, that Eleventh Amendment immunity represents a real limitation on a federal court's federal question jurisdiction. The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading. Application of the Young exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction.

Ceour d'Alene went on to declare that "As no one disputes, the Young fiction is an exercise in line drawing. There is no reason why the line cannot be drawn to reflect the real interests of States consistent with the clarity and certainty appropriate to the Eleventh Amendment's jurisdictional inquiry." Nevertheless, that case presented no barrier for lower Courts to draw the line anywhere a federal judge happened to wish to draw it.

In Seminole, this Court did attempt to provide some guidance about where to "draw the line" declaring that "[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon Ex parte Young." Seminole, 517 U.S. at 74. The language, here, that a court should "hesitate," does not

preclude the possibility for a court to act anyway, and in fact, places no restrictions at all upon lower courts' invocation of Young.

This Court seems intent on ensuring "that the sovereign immunity doctrine remains meaningful" (Ceour d'Alene), and by its example of refusing to invoke Young in each of its many Eleventh Amendment cases decided in recent years, has tried to give direction to the lower courts. However, the large number of Eleventh Amendment cases which this Court has been forced to hear and overturn over the last 5 years is testimony to the fact that lower courts have failed to follow the example of this Court.

One possibility to limit the reach of Young would be for this Court to declare that it can be invoked only in Fourteenth Amendment cases, which is probably what the original decision in Young intended.[3]

CONCLUSION

Over the years, previous Courts which were hostile to the Eleventh Amendment tried to carve out various exceptions to it. At least in the interval between *Parden* and *Seminole Tribe*, we witnessed a steady erosion of the Eleventh Amendment, which this Court has reversed in the last five years.

Nevertheless, a minority on this Court (but apparently a majority on some lower courts) has signaled that "they are

[3] The *Young* court seems to have been searching for a mechanism to enforce the Fourteenth Amendment, but was not so brazen to think it could simply declare the Eleventh Amendment cancelled with respect to the Fourteenth. Given that this Court seems determined (for the time being) to stand behind *Fitzpatrick*, the need for *Young* seems to have passed, and folding *Young* into *Fitzpatrick* would help create a more clean and coherent Eleventh Amendment jurisprudence.

'not *yet* ready,' to adhere to the still-warm precedent of *Seminole Tribe* and to the 110-year-old decision in *Hans* that supports it" (College Savings Bank). Despite literally dozens of precedents to the contrary stretching back to the earliest days of the Republic, opponents of the Eleventh Amendment adhere only to a few singular precedents which include *Chisholm*, *Young*, *Parden* and *Union Gas* (see College Savings Bank, footnote 5), while ignoring "constitutional tradition and precedent as clear and conclusive, and almost as venerable, as that which consigns debate over whether *Marbury* v. *Madison* was wrongly decided to forums more other-worldly than ours" (College Savings Bank).

It is almost hard to imagine how the Seventh Circuit – among others – could posit a theory so remarkably similar to *Parden* except for simple refusal to adhere to the still warm precedent of *College Savings Bank*, plus the more than a century of jurisprudence which supports it.

While Courts understandably try to steer clear of broad general pronouncements, we can only suggest that some very strong general guidelines for lower courts may be in order here if this Court wishes to avoid retracing the same steps over and over as lower courts seem to refuse to apply what should be clear precedents.

For these reasons we urge that the ruling of the Seventh Circuit Court of Appeals be reversed.

Respectfully Submitted,
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